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Supreme Court of the United States

October Term, 1950.
No. 311

GEORGE T. GOGGIN, Receiver of the Estate of Salsbury Motors, Inc., Debtor,

Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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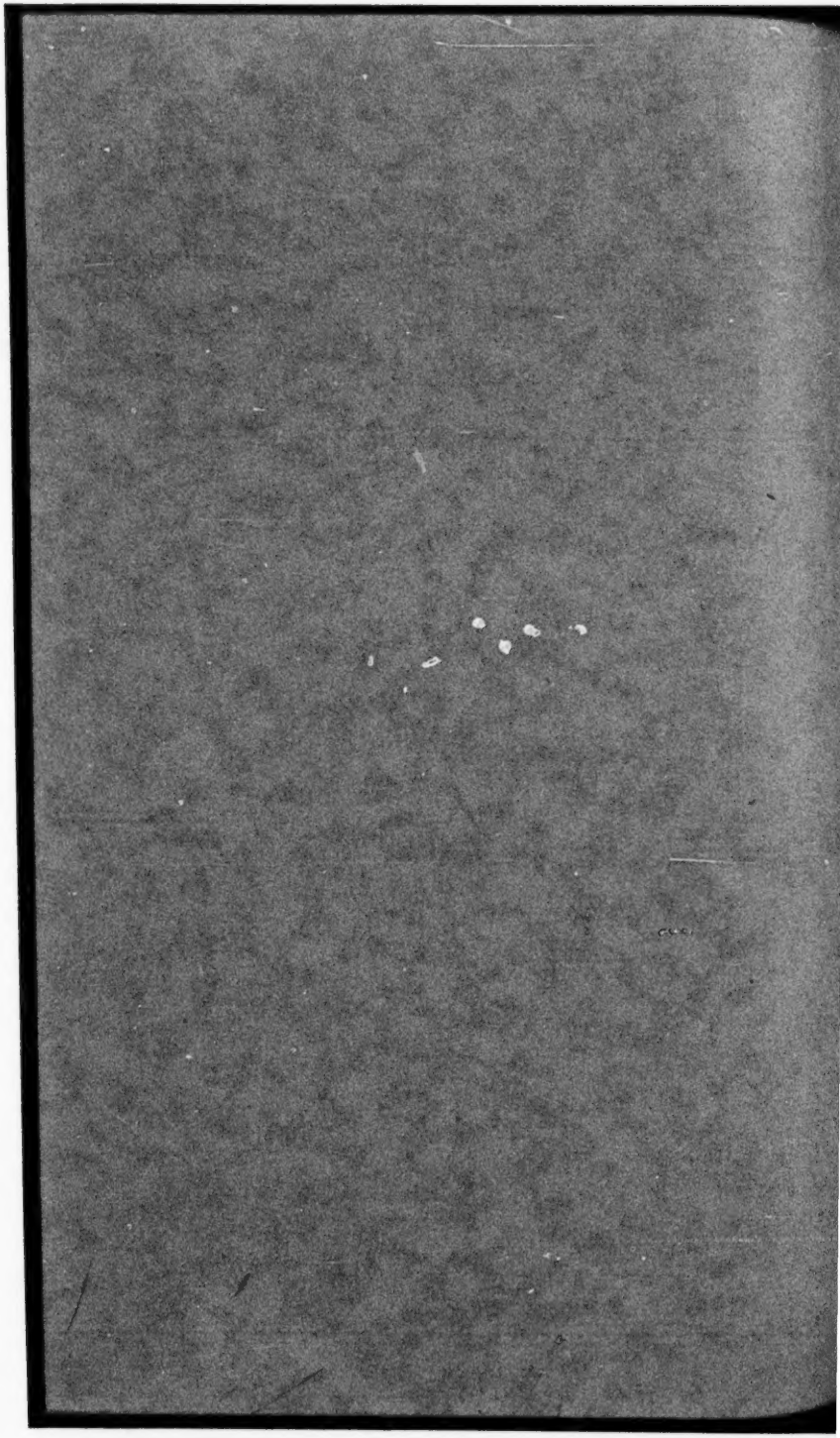

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner George T. Goggin (hereinafter referred to as Receiver) as Receiver of the Estate of Salsbury Motors, Inc. (hereinafter referred to as Salsbury or Debtor) prays that a writ of certiorari issue to reveiw the final judgment of the United States Court of Appeals for the Ninth Circuit, which Judgment was entered by that Court on June 23, 1950, subsequent to the issuance by that Court of an order granting a rehearing and vacating Judgment and Opinion previously filed and entered on February 23, 1950. The judgment of the Court of Appeals, which affirmed the judgment of the Bankruptcy Court (both that of the Referee in Bankruptcy and the

United States District Court) was that a bank is entitled to assert its alleged banker's lien as against notes and drafts of a customer which notes and drafts were in the custody of the bank for collection only; this commercial paper was not yet collected at the time of the filing of the petition under Chapter XI of the Bankruptcy Act by Salsbury, and no credit was extended in reliance upon said notes and drafts. In effect the judgment of the Court below erroneously held that notes and drafts left with a bank's collection department are always subject to the assertion of an alleged banker's lien, even though the notes and drafts were transmitted to the bank for collection only, so long as the person leaving them owes money to the bank; in the instant case the agency for collection was terminated by the Receiver after bankruptcy proceedings were commenced and prior to collection.

Opinions Below.

The Opinion of the Court of Appeals for the Ninth Circuit is set forth verbatim in the Record at pages 123 to 133. The earlier Opinion of said Court, which was vacated and set aside upon Petition for Rehearing, has been set forth in full as an appendix to this Petition.

The judgment of the District Court merely affirms the Referee in Bankruptcy without opinion. [R. 109.] The Referee made Findings of Fact, Conclusions of Law and Order [R. 80], rendered a Memorandum Opinion on the question of summary jurisdiction [R. 44] and rendered a further opinion in his final disposition of the within proceedings. [R. 78.]

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was filed on June 23, 1950. The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254, as amended by the Act of June 25, 1948 (Public Law 773, 80th Congress; Chapter 646, Second Session); and as further amended, and under Section 24(c) of the Bankruptcy Act, 11 U. S. C., Section 47(c).

Question Presented.

May a bank assert a banker's lien upon uncollected notes and drafts belonging to the debtor where, at the time of the filing of the petition under Chapter XI of the Bankruptcy Act, the notes and drafts were in the custody of the bank for collection only and no credit had been extended by the bank upon the faith of those notes and drafts?

Statutes Involved.

1. Section 3054 of the Civil Code of California:

   "A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business."

2. Section 67(b) of the Bankruptcy Act:

   "The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid

against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under Chapter X, XI, XII or XIII of this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court."

Introductory Statement of Facts.

The STATEMENT contained in the next succeeding section of this Petition is a detailed statement of facts with specific references to the Record. Petitioner makes this INTRODUCTORY STATEMENT in order to describe the ultimate factual situation giving rise to the question presented.

Salsbury made a loan arrangement with the Bank of America which contemplated present and future credit. This loan was evidenced by written agreements (later amended), and security in the form of a trust deed on Salsbury's property. Salsbury maintained general deposit accounts with the Bank and also used the Bank's collection department for the collection of notes and drafts accompanied by order bills of lading evidencing sales of merchandise by Salsbury. These notes and drafts were no part of the loan arrangement with the Bank. They were delivered to the Bank for collection only, and the proceeds were to be deposited in Salsbury's regular general account.

When the present Chapter XI proceedings were instituted, approximately $178,000.00 of these notes and drafts were in the hands of the Bank and not yet collected. The Bank insisted that it had a lien which entitled it to retain this commercial paper, collect it, and keep the proceeds—all in addition to its exercised right of set-off of cash in bank deposits and right to foreclose under the trust deed. Despite the instructions of Salsbury and the Receiver's notification to the Bank (after commencement of these proceedings) that the Bank's agency to collect was terminated, the Bank collected the notes and drafts and retained the proceeds.

Statement.

The facts and background of this case are summarized in the opinion of the United States Court of Appeals for the Ninth Circuit [R. 123-124] and are largely to be found in a stipulation entered into between the Receiver and the Bank through their respective counsel. [R. 68-77.] According to that stipulation, the Bank loaned Salsbury the sum of $180,000 which loan was secured by a deed of trust upon certain real property; Salsbury's plant was located on that property. This deed of trust secured, by its very terms, not only the repayment of $180,000, but any other indebtedness of Salsbury to the Bank whether then existing or thereafter created. Subsequently, the terms of the foregoing credit arrangement were amended to the extent that additional funds were made available to Salsbury. Pursuant to the specific written agreements an aggregate amount in excess of $600,000 was ultimately loaned by the Bank to Salsbury. [R. 69.]

At the same time, Salsbury maintained its major deposit accounts with the Bank as a bank of deposit. Salsbury also placed with the Bank, for collection only, notes and drafts accompanied by order bills of lading evidencing sales of merchandise by Salsbury. This arrangement was set forth in the stipulation of the parties as follows:

> "None of the notes and drafts or bills of lading accompanying the same deposited by the debtor with claimant as collection items during the course of the operation of the business of the debtor from the time of the loan agreement on February 18, 1946, to the date of filing the petition in the above-entitled proceedings was at any time pledged by the debtor to secure any indebtedness of the debtor to claimant. No immediate credit was given by claimant to the deposit accounts of the debtor upon the deposit of any of said collection items but all of said items were deposited with claimant for collection and credit of the proceeds of the collection to the deposit account of the debtor when said collections were completed. During the period from February 18, 1946, to August 19, 1947, claimant did, in the usual course of business, credit to the deposit account of the debtor, as and when received, the proceeds of all collection items in accordance with the instructions of the debtor. In each of the collection items in the hands of claimant on August 20, 1947, the debtor had issued and claimant had accepted instructions to credit the proceeds of said collections when received to the commercial deposit account of the debtor." [R. 76.]

From June of 1946 until December of 1946, these collection items deposited with the Bank averaged from $40,000 to $50,000 per month; during the year 1947 and up to August 20, 1947 (the date of the filing of the petition herein), these collection items averaged approximately $150,000 per month. [R. 70.] On the day preceding the filing of the petition herein, Salsbury advised the Bank of its intentions and the Bank thereupon offset and retained the balance of cash deposit accounts of Salsbury in the aggregate amount of $161,125.55 and refused to allow withdrawals. Taking this offset into account, there was still due and unpaid the principal sum of $601,482.80. [R. 70.] On the date of the filing of the petition herein, August 20, 1947, the Bank held in its custody certain notes and drafts owned by Salsbury drawn upon drawee purchasers in amounts set forth in the Record herein at pages 54 and 55, totaling $178,950.93. The Bank likewise held order bills of lading representing the right to receive merchandise described therein, which merchandise was in the course of shipment to the various drawee purchasers. [R. 71.] On August 21, 1947, Salsbury advised the Bank in writing that its authority to collect a note on which Jacques Power Saw Company of Denison, Texas, was the payor was immediately terminated and that collection would be effected by direct dealing between Salsbury and Jacques Power Saw Company. [R. 74-75.] The Bank refused to recognize this termination of authority and collected the note. [R. 75-76.] Thereafter, contrary to the demands of the Receiver, the Bank collected substantially all of the totals represented by said bills of lading except for certain rejected drafts, more fully described in the stipulation. [R. 71-74.] The Bank refused to turn over any of the notes, drafts or collection

items hereinabove referred to, or the proceeds thereof, and finally the Bank filed its proof of claim against the estate of the Debtor. [R. 77; 13-36.]

The Receiver sought to bring this matter to a head on November 20, 1947, by the filing of a PETITION FOR ORDER TO SHOW CAUSE AGAINST BANK OF AMERICA RE: JACQUES POWER SAW COMPANY and an order to show cause was issued thereon on the same day [R. 37-40]; the Bank filed its objections to the summary jurisdiction of the Bankruptcy Court. [R. 40-43.] The Referee filed a Memorandum Opinion indicating that the Bank's objections to the summary jurisdiction would be overruled and holding that the Bank had only a colorable claim and was not a *bona fide* adverse claimant. [Tr. 44-47.] The Receiver thereupon filed OBJECTIONS TO CLAIM OF THE BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION AND PRAYER FOR AFFIRMATIVE RELIEF, in which he contended that Salsbury was the owner of the commercial paper in the custody of the Bank at the time of the filing of the Petition herein and that the Debtor was further entitled to physical, as well as legal, possession of this paper. At the same time, the Receiver prayed for an order sustaining his objections to the claims of the Bank and for an affirmative order directing the Bank to forthwith turn over to the Receiver the sum of $178,950.93. [R. 48-57.] The Bank filed an answer to the Objections of the Receiver [R. 58-66] and the Referee ordered that the Jacques Power Saw matter and the Objections to the claim of the Bank be consolidated by

stipulation [R. 68-69] for all purposes of hearing and decision. [R. 67-68.]

On March 4, 1948, the Referee filed a Memorandum Opinion with respect to the claim of the Bank in which he stated that under Section 3054 of the Civil Code of California the Bank was entitled to a lien upon the negotiable paper placed in the custody of the Bank by Salsbury for the purposes of collection only, and that the Bank was therefore entitled to retain the proceeds from that commercial paper. [R. 78-80.] Findings, Conclusions and an Order allowing the claim were subsequently filed [R. 80-92], and a petition for review was filed in the District Court but that court denied the petition for review by an order dated January 19, 1949. [R. 109-110.] The District Court merely confirmed, approved and adopted the Findings and Conclusions of the Referee below [R. 110] and an appeal was duly taken from that order to the United States Court of Appeals for the Ninth Circuit. [R. 111.]

The United States Court of Appeals rendered an Opinion on February 23, 1950, in which it affirmed the order of the District Court. For the convenience of this Court that Opinion is set forth in full in an appendix to this brief. In that Opinion, the Court relied upon a stipulation made at the time of the hearing on summary jurisdiction, to the effect that there was an "implied understanding" that collection notes or sight drafts or bills of lading "would be handled through the collection department of the Bank of America." From this stipula-

tion the Court erroneously concluded that there had been credit advanced upon the faith of the notes and drafts in dispute.

In a Petition for Rehearing the Receiver contended that the stipulation above referred to had been made during an argument on the question of summary jurisdiction [R. 104] and that the stipulation was effective by its own terms only "for the purpose only of this proceeding to determine, that is, to permit the Court to determine whether or not there is color of title in the Bank on this objection to this petition." [R. 108.] In the Petition for Rehearing the Receiver further pointed out, and the Bank tacitly admitted, that the Referee below had never made a finding that credit had ever been extended upon the faith of this paper and that the Referee had decided the matter upon his interpretation of California Civil Code, Section 3054; the Referee was of the opinion that Section 3054 must be applied mechanically and that so long as Salsbury owed money to the Bank and the Bank had custody of property of the Debtor, the banker's lien would apply. In so holding the Referee relied upon his own interpretation of a *dictum* in a California case, *Gonsalves v. Bank of America* (1940), 16 Cal. 2d 169. [R. 78.] Both in his Memorandum Opinion [R. 78-80] and in the Findings, Conclusions and Order [R. 80-92] the Referee expressly refused to find that there had been credit extended by the Bank to Salsbury on the faith of the notes and drafts here involved.

The United States Court of Appeals for the Ninth Circuit granted the Petition for Rehearing and on June 23, 1950, filed its Opinion which is the subject of the present Petition for Certiorari before this Honorable Court. In that opinion the Court conceded that "no credit upon specific items was given upon the delivery of any of the collection items to the Bank, nor had such credit been given or asserted prior to the institution of these proceedings." [R. 132.] Nevertheless, the Court decided that where money was owing to the Bank and the debtor-customer placed his property in the banker's hands "in the course of the business [of banking]," the banker's lien applied. It is with this erroneous mechanical interpretation of the banker's lien statute that the Receiver takes direct issue.

Petitioner stresses the fact that the debt owing by Salsbury to the Bank is evidenced by written instruments which may be found in the Record, pages 16 through 36. These written secured lending arrangements reveal on their face that the loan was an ordinary commercial transaction that did not contemplate security in the form of the notes and drafts here involved. None of these notes and drafts was ever discounted by the Bank and no overdraft was ever permitted on the faith of these notes and drafts. These notes and drafts were delivered for collection only. [R. 89.] At no time during the dealings between the Bank and the Debtor did the Bank discount any similar notes or drafts or advance credit thereon.

REASONS FOR GRANTING THE WRIT.

I.

The Extent and Operation of the Banker's Lien Is of Vital Importance in the Administration of the Bankruptcy Act.

Banking institutions occupy so prominent a place in our business community that it is by no means unusual that they are significant factors in most bankruptcy proceedings. Banks have an advantage in bankruptcy owing to their right of setoff. In addition, banks usually require security on loans, and therefore present themselves as secured creditors before the bankruptcy court. In the present case, the Bank has taken advantage of both of the foregoing devices. More than these, however, the Bank demands the right to assert a banker's lien against notes and drafts belonging to Salsbury and in the hands of the Bank for collection only. The Bank did not discount any of these notes and drafts; no credit was advanced upon the faith of the commercial paper; instead, the Bank acted as a collection agent, receiving a fee therefor, subject to the directions of its principal.

At the time of the filing of the petition herein Salsbury owed money to the Bank. The Bank, after the filing, seized the commercial paper belonging to its principal under the alleged authority of California Civil Code, Section 3054, taking the mechanical position that this property was in its hands, that it belonged to the customer, and that there was a balance due to the Bank from the customer "in the course of the business." As will be demonstrated below, the banker's lien has never been given such effect by the courts at common-law, by the California courts, or by this Honorable Court. The banker's lien is applicable

only where the bank has given credit (or suffered a balance to remain) upon the faith of the property involved. The lien was created for the purpose of protecting banks where notes, drafts and bills of exchange were accepted by them and credit given the customer in return. This is what the statute and the cases mean by a balance due in "the course of *the* business."

Where, however, the banks have so extended their functions as to include many non-banking services, the lien should not be distorted (by fiction or otherwise) to permit one department of a bank to violate the principal-agency relationship upon the ground that another department of the bank has made a *regular, secured, written commercial loan* to the same principal-customer. The court below has so distorted the concept and function of the banker's lien. If permitted to stand, the opinion of the Court of Appeals will have an illegal and inequitable deleterious effect upon the administration of bankrupt estates and of reorganization proceedings. Where business firms are permitted overdrafts or are given other credit by banks upon the faith of the deposit of commercial paper, such firms must anticipate the possibility of the exercise of the banker's lien —even where bankruptcy intervenes. But where the bank takes the paper for collection only (with the usual charges therefor) it should not be permitted to assert a lien upon the alleged ground that a balance is due upon a regular commercial loan, secured or unsecured. Although in the present case, Salsbury's estate has been liquidated, in other cases the assertion of the lien will destroy the projected arrangements because the anticipated capital to be realized from the commercial paper will be seized by the bank. Even in ordinary bankruptcies, the exercise of the lien will have a detrimental effect not only on general unsecured creditors,

but on labor claimants and taxing agencies as well. In view of the contrary declarations by this Court, the judgments below should be reversed.

To allow the Bank a lien upon the commercial paper involved in the instant appeal would be directly contrary to the provisions of the Bankruptcy Act, particularly Section 60a, and the cases interpreting the Act;[1] the Court below in effect finds a statutory lien by presumption, contrary to law, and attempts thereby to validate a conversion of estate assets to the detriment of all other creditors in a manner which would obviously constitute a voidable preference if committed within four months prior to bankruptcy, since the Bank had actual notice of the insolvency of the Debtor. We must consider the admitted fact that all of the Bank's loans were based on express written lending agreements and no creditor—be he laborer, taxing agency or commercial account—could have discovered or anticipated the conversion by the Bank because none of the lending agreements provided for the discounting or pledging of the commercial paper in question. The administration of Courts of Bankruptcy is based upon equity and we cannot conceive that equity will recognize the "strong arm" seizure by the Bank, after bankruptcy proceedings commenced, as a justifiable exercise of an alleged statutory lien. Although the instant case involves the banker's lien statute of the State of California, the question presented is of vital importance to the administration of the Bankruptcy Act throughout the United States because almost every state in the Union has a similar banker's lien statute or recognizes the common law banker's lien.

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[1]See, for example, *Corn Exchange National Bank & Trust Co., et al. v. Klauder,* 318 U. S. 434; and see, 3 *Collier on Bankruptcy* (14th Ed.), pp. 967-968.

II.

The Opinion of the Court of Appeals Herein Is Contrary to the Language and Rulings of This Court.

The opinion of the Court of Appeals herein recognizes the declaration of the California courts that the codification of the doctrine of the banker's lien does not extend its common-law scope. [R. 125.] When California Civil Code Section 3054, was proposed and enacted, the Code Commissioners annotated the section by citing six cases.[2] Two of the cited cases were from this Court, *Bank of Metropolis v. New England Bank* (1843), 42 U. S. 234; *ibid.* 47 U. S. 225. Thus, the California Code Commissioners and the Legislature had these cases in mind when the banker's lien section was proposed and enacted.

Both of the *Bank of Metropolis* cases involved the same set of facts. The Commonwealth bank was indebted to the Bank of Metropolis as a result of the mutual remittance of various types of commercial paper for collection; when the bills were paid, they were credited to the bank

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[2]"Note—*Davis v. Bowsher,* 5 T. R., p. 488; see *Brandao v. Burnett,* 3 C. B., p. 519; rev'g S. C., 6 M. & G., p. 630; and affirming S. C., 1 M. & G., p. 908; *Bank of Metropolis v. New England Bank,* 1 How. U. S., p. 234; 6 *Id.,* p. 212; *Van Amee v. Bank of Troy,* 8 Barb., p. 312; 5 How. Pr., p. 161; *McBride v. Farmers' Bank,* 25 Barb., p. 657; 26 N. Y., p. 450." (2 Civil Code of the State of California [1872], p. 315.)

On page vi of the Preface to the foregoing Code, the Code Commissioners explain at length that the object of such "Notes" is to "explain the *reason* and *intent* of the law." (Commissioners' italics.)

sending them, by means of an account that was currently kept by both banks. The banks regularly settled with each other after taking out costs and expenses. At a time when Commonwealth became insolvent, it was indebted to Metropolis (according to the above-described account) and Metropolis in turn held certain paper transmitted by Commonwealth but deposited by a third bank, the New England Bank. The latter bank demanded that Metropolis turn over the paper and the trial court sustained this demand. The case involved the questions whether Metropolis was entitled to treat the paper as though it belonged to Commonwealth and, if so entitled, whether Metropolis was entitled to retain the paper under its alleged banker's lien.

In the first case (42 U. S. 234) this Court stated that so long as Metropolis did not know of the agency (whereby New England Bank transmitted paper to Commonwealth) it was entitled to proceed as though Commonwealth owned the paper. The issue regarding the lien was therefore clearly drawn. The Opinion stated that ". . . if an advance of money had been made upon this paper to the Commonwealth Bank, the right to retain [by Metropolis] for that amount would hardly be disputed." (42 U. S. at 239.) This Court went on to state that it saw no substantial difference between an actual advance of money and "a balance suffered to remain upon the faith of these mutual dealings. In the one case, as well as the other, credit is given upon the paper deposited or expected to be transmitted in the usual course of the transactions between the parties." (42 U. S. at 239.) If the lower court should

find that Metropolis treated Commonwealth as the owner and that ". . . balances were from time to time suffered to remain in the hands of each other to be met by the proceeds of negotiable paper deposited or expected to be transmitted in the usual course of the dealings between them, then the plaintiff in error [Metropolis] is entitled to retain for the amount due on the settlement of the account." (42 U. S. at 240.) The judgment was reversed.

In the second *Metropolis* case (47 U. S. 212), this Court found that the circuit court had instructed the jury in an unnecessarily confusing manner. Accordingly, the unusual practice was adopted of proposing instructions for use by the lower court. The first instruction merely dealt with the question of notice of ownership of the negotiable paper. The second and third instructions are particularly pertinent to the instant case (47 U. S. at 240):

> "2. And if the Bank of the Metropolis had not notice that the Commonwealth Bank was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the Bank of the Metropolis is not entitled to retain against the real owners, unless credit was given to the Commonwealth Bank, or balances suffered to remain in its hands to be met by the negotiable paper transmitted or expected to be transmitted in the usual course of dealings between the two banks.
>
> "3. But if the jury found that, in the dealings mentioned in the testimony, the Bank of the Metropolis

regarded and treated the Commonwealth Bank as the owner of the negotiable paper which it transmitted for collection, and had no notice to the contrary, and upon the credit of such remittances made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the plaintiff in error is entitled to retain against the defendant in error for the balance of account due from the Commonwealth Bank."

The foregoing expressions unequivocally require the extension of credit, or the suffering of a balance, upon the faith of the commercial paper—in accordance with the regular dealings of the parties and in the usual course of the business between the customer and the bank. The Court of Appeals below attempted to distinguish these cases on the theory that third parties were involved and that the principal question was whether the property "belonged to a customer;" the Court of Appeals interpreted the *Bank of Metropolis* cases as holding that where the correspondent bank is unaware of the undisclosed principal's ownership "the lien has been allowed by some courts provided that the correspondent bank has extended new credit to the forwarding bank on the faith of the items forwarded for collection or has suffered a balance to remain upon the faith of their mutual dealings." [R. 131-132, fn. 4(3).] No such limitation appears in the Opinions of this Court. Indeed, in *Hanover Bank v. Insurance Company* (1881), 104

U. S. 54, at p. 71, this Court made the following statement regarding banker's lien:

> "Evidently the bank has no better right than Dillon, unless it can obtain it through its banker's lien. Ordinarily that attaches in favor of the bank upon the securities and moneys of the customer deposited in the usual course of the business, for advances which are supposed to be made upon their credit. It attaches to such securities and funds, not only against the depositor, but against the unknown equities of all others in interest, unless modified or waived by some agreement, express or implied, or by conduct inconsistent with its assertion. But it cannot be permitted to prevail against the equity of the beneficial owner, of which the bank has notice, either actual or constructive."

The *Hanover Bank* case clearly demonstrates that the only question arising in third party cases is whether the correspondent bank has knowledge of the third party's equity or ownership. Once that question is answered in the negative, the usual rules as to banker's lien become applicable. The Court of Appeals herein has materially and unwarrantedly altered the rules set down by this Court for the application of the banker's lien.

III.

The Opinion of the Court of Appeals Unjustifiably Extends the Scope of the Banker's Lien by the Use of a Fiction.

The Court of Appeals below has destroyed the original and salutary requirement that the banker's lien shall exist to protect banks for extensions of credit made actually or presumably in reliance upon securities in their possession. The Bank, in its arguments below, placed considerable emphasis upon this alleged presumption. The Court of Appeals, in its opinion [R. 127-128, fn. 2], also relies upon statements in certain state cases to the effect that it is presumed (or, it is a theory) that the loan or overdraft is given on the faith that money or securities belonging to the customer will come into the possession of the bank. But the cases clearly reveal that this presumption or theory arises in a particular case from a course of dealings whereby the customer receives the benefit of credit or overdraft based upon the deposit of such paper. The *Bank of Metropolis* case is an excellent example. Similarly, the theory is forcefully revealed in the ancient case of *Davis v. Bowsher* (1794), 5 T. R. 488, cited by the California Code Commissioners as demonstrative of the meaning of Calif. Civ. Code Sec. 3054.[3]

In the *Davis* case, the customer maintained a general account of commercial bills with his banker and received

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[3]"Note—*Davis v. Bowsher*, 5 T. R., p. 488; see *Brandao v. Burnett*, 3 C. B., p. 519; rev'g S. C., 6 M. & G., p. 630; and affirming S. C., 1 M. & G., p. 908; *Bank of Metropolis v. New England Bank*, 1 How. U. S., p. 234; 6 *Id.*, p. 212; *Van Amee v. Bank of Troy*, 8 Barb., p. 312; 5 How. Pr., p. 161; *McBride v. Farmers' Bank*, 25 Barb., p. 657; 26 N. Y., p. 450." (2 Civil Code of the State of California [1872], p. 315.)

credit thereon. The bank did not discount each bill, but extended credit as desired and discounted any bill in the account most approximate in amount to the credit desired. Ultimately, the bank refused further credit and retained all of the bills to protect itself in the event "any of the discounted bills should prove bad" since some were not yet due. The question decided by the English court effectively highlights the principles involved in the instant case. The *Davis* case was one of the first to give expression to the banker's lien. The customer contended that the bank had relied only upon the bills actually discounted and that since no credit had been expressly extended upon the other bills, the banker's lien was limited only to the discounted bills. Up to the time the *Davis* case was decided, it was apparently believed that the lien extended only to the very bills discounted, despite the practice of the parties of keeping a running account of credit and deposit. The reporter summed up the Court's holding in the following words:

> "A customer lodges bills of exchange in the hands of his banker generally, and when the banker advances money to him, he applies it to the discount of such bills as happen to be nearest in value to the sum advanced, but without any special agreement to that effect. This does not invalidate the banker's general lien upon all the other bills in his hands, but he may retain them in order to secure the payment of his general balance." (101 Eng. Rep. 275.)

The *Davis* case reveals the circumstances under which a banker may be "presumed" to have advanced money upon the faith of securities in his possession, or about to come into his possession. Under the mechanical approach of the Bank and the Court of Appeals herein, it is difficult to understand how there could have been a contest in the

Davis case. Property belonging to the customer was in the hands of the bank and the customer owed money to the bank. In the opinion of the Court of Appeals, and according to the Bank, these facts alone compel the application of the banker's lien—unless the property has been deposited for a special purpose.

This last exception, the deposit pursuant to a special agreement incompatible with a right of general lien has been used by the Bank and by the Court of Appeals [R. 130, fn. 4] to explain away all of the numerous cases which deny the existence of the banker's lien where no credit had been extended upon the faith of the property in the hands of the bank.

As will be demonstrated in the next succeeding portion of this Petition, the California law (as expressed in the recent case of *Engleman v. Bank of America* [July 7, 1950] 98 A. C. A. 509) would consider the collection items involved in the instant case as a deposit for a special purpose. At present, however, it is important to note that no such exception is stated in Section 3054 of the California Civil Code. The banker's lien statute in California, as well as the commercial law definition of the banker's lien commonly set forth in texts, merely states that property belonging to the customer and in the hands of the bank may be retained by the bank for the general balance owing in the course of *the* business. The exceptions arise when courts are presented with a claim of banker's lien but with no demonstration of an extension of credit on the faith of the items allegedly subject to that lien. It is this significant requirement of the extension of credit that explains all of the important exceptions to the customary sweeping definition of the banker's lien. Nevertheless, the Court of Appeals herein has undertaken merely to list

those exceptions without attempting to set forth the explanation therefor. Even a cursory study of the cases which deny the claim of lien reveal that their principal common feature is the inability of the bank to prove that credit had been extended upon the faith of the items under dispute.

For example, where property was in the hands of the Bank by virtue of storage in its safety deposit box, the English court held that the Bank did not have a lien. (*Brandao v. Burnett* [1846] 3 C. B. 519—cited by the California Code Commissioners.) In the *Brandao* case, the court explained that the right of the lien is in the nature of "an implied pledge." Where property is in the hands of the Bank to secure a particular debt, this Court has held that there is no lien (*Reynes v. Dumont* [1889] 130 U. S. 354) as has the California Supreme Court (*Berry v. Bank of Bakersfield* [1918] 177 Cal. 206.) This Court has likewise refused to apply the lien where commercial paper was delivered to the Bank solely for discount and credit and the Bank refused to discount. (*Bank of Montreal v. White* [1880] 154 U. S. 660; *Hanover Nat'l Bank v. Suddath* [1909] 215 U. S. 110.)

Cases similar to those cited immediately above could be multiplied at length.[4] Courts refuse to apply the banker's lien unless credit is extended upon the faith of the property in the hands of the bank and belonging to the customer.

The instant case is one where the Bank sought (and received) security for its loan. No mention was made of

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[4]See, for example: *Anglo-Californian Bank v. Grangers' Bank* [1883], 63 Cal. 359; *Powell v. Bank of America* [1942], 53 Cal. App. 2d 458; *Della v. The Home Bank of Porterville* [1930], 105 Cal. App. 106; *In re Cummins Construction Corp.* [1947, D. C. Md.], 72 Fed. Supp. 409, *aff'd* 164 F. 2d 983.

commercial paper. No credit was ever extended upon the faith of that paper, and the Court of Appeals so found. The Bank merely took the paper subject to instructions by its principal. The paper was placed with the Bank solely for the purposes of collection and credit to Salsbury's general account. At any time, the agency could have been cancelled, subject to the Bank's charges for its services, if any. The placing of commercial paper with a bank for collection only is as much a deposit for a special purpose as property placed with the bank in escrow or as security for a particular debt. In the *Davis* case the customer could not remove the bills because credit had been extended upon the faith of all the paper and some of the bills that were discounted might have been bad; the Bank in the instant case contends that the negotiable paper herein could also have been held to secure the "general balance." This compels the following unsupportable thesis: if Salsbury had been regularly making its payments on the loan, it could still have been prevented from withdrawing its collection items from the Bank until the entire balance of the loan had been paid. Such also is the ruling of the Court of Appeals. This reasoning negates the principal-agency relationship and destroys the common and legal meaning of a mere delivery of paper for collection only. The dealings between the Bank's collection department and Salsbury did not result in any balance in favor of the Bank. The Bank was under orders to collect the paper and deposit the proceeds. It had no authority to proceed once Salsbury demanded the return of the paper.

IV.

The Opinion of the Court of Appeals Is in Direct Conflict With Governing California Law Respecting the Extent of the Banker's Lien.

Earlier in this Brief, petitioners have set forth the cases that the Code Commissioners (and presumably the Legislature) deemed significant and controlling in the interpretation of the banker's lien, as set out in California Civil Code, Section 3054.[5] Similarly, California cases have been cited to demonstrate that unless credit is extended upon the faith of the property belonging to the customer and in the hands of the bank, such property will be deemed free of the lien and impressed with a special purpose. The Referee below, however, relied upon a dictum in *Gonsalves v. Bank of America* (1940), 16 Cal. 2d 169 [R. 78-79] as authority for his holding that the banker's lien may be applied in the present case. The court, in the *Gonsalves* case, merely distinguished between lien and setoff, stating that the lien more properly applies to securities and commercial paper, whereas an alleged "lien" on a depositor's funds on deposit is technically not a lien at all. The holding of the case

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[5]"Note—*Davis v. Bowsher*, 5 T. R., p. 488; see *Brandao v. Burnett*, 3 C. B., p. 519; rev'g S. C., 6 M. & G., p. 630; and affirming S. C., 1 M. & G., p. 908; *Bank of Metropolis v. New England Bank*, 1 How. U. S., p. 234; 6 *Id.*, p. 212; *Van Amee v. Bank of Troy*, 8 Barb., p. 312; 5 How. Pr., p. 161; *McBride v. Farmers' Bank*, 25 Barb., p. 657; 26 N. Y., p. 450." (2 Civil Code of the State of California [1872], p. 315.)

The other two cases cited by the Code Commissioners, the *Van Amee* and *McBride* cases, have not been digested at length since they are in accord with the rule stated herein and with the *Bank of Metropolis* cases decided by this Court. In both the *Van Amee* and *McBride* cases, the New York court expressly stated that unless the bank claiming the lien could show that it had relied upon the commercial items as security for advances or for a balance maintained, the banker's lien would not apply.

had nothing to do with banker's lien. The California court, in its opinion, did no more than quote from Section 3054 and did not purport to set out the limitations on that broad language; these exceptions and limitations, as shown above, are well established under California law.

In addition to the cases already cited, the California District Court of Appeal has very recently decided the important case of *Engleman v. Bank of America* (July 7, 1950), 98 A. C. A. 509, reported too late to bring to the attention of the Court of Appeals.[6] The plaintiff in the *Engleman* case was an assignee for the benefit of creditors who brought the action against the Bank to recover moneys owing to the assignor. The assignor was engaged in selling courses in flight instruction; students signed contracts and notes in payment for the course. The assignor sold the contracts and notes to the Bank, pursuant to contracts entered into between the assignor and two branches of the Bank—Gardena and Five Points. The assignor made separate contracts with each branch, providing that collections made by the branch bank were to be held as a reserve account which could be used only in either of two specified ways:

> "The primary use to which the fund was to be put was to cure the default in any note purchased under that particular contract, or, if no such default existed, the fund was to be paid or credited annually to plaintiff's assignor. The fund with which we are here concerned had accumulated as the result of payments made on notes bought and sold under the Gardena contract, and had been neither paid, nor credited, to plain-

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[6]This case has apparently become final.

tiff's assignor. In other words, the funds remained in the reserve account provided for in the contract." (98 A. C. A. at 512.)

The Bank attempted to apply the Gardena surplus to a deficit at Five Points after notification from the assignor that no such authority would be given because of pressure from creditors.

The District Court of Appeal held that the assignee was entitled to recover the amount of the Gardena surplus converted by the Bank, over the contentions of the Bank that both offset and banker's lien applied. The Court held that the "reserve fund" surplus, retained by the Bank under instructions to be *paid or credited* to the assignor, was in the nature of a special deposit. In the course of the opinion, the Court stated:

". . . In addition, the bank has the fiduciary duty of an agent to apply the deposit to the particular purpose for which it was delivered to the bank, and in case of the misapplication of the deposit, it may be followed on the trust fund theory. In *Hing v. Lee,* 37 Cal. App. 313 [174 P. 356], mortgages and other instruments were deposited for collection and were given over with specific instructions to collect and remit. The court held that this was a trust transaction, and that the money, if collected, was affected with the trust. (See 8 So. Cal. L. Rev. 122, discussing deposits for specific purposes.)

"Where property is pledged to a bank to secure specific indebtedness of the customer, the bank has no right to hold such property as security for any other obligation. If under the contract of the parties, the reserve fund was to be used to satisfy the obligation of plaintiff's assignor *or to be paid or credited to him annually,* the appellant was not entitled to hold it, un-

der its alleged banker's lien, to secure another obligation. 'The banker's lien referred to in section 3054 of the Civil Code, was familiar, as a part of the law, long before the enactment of the codes. Section 3054 does not extend its scope. It has always been the rule that a banker holding securities pledged for the payment of a particular debt has no lien upon them for the payment of other claims.' (*Berry v. Bank of Bakersfield,* 177 Cal. 206, 209 [170 P. 415]; and authorities there cited; *Farmers & Merchants Nat. Bank v. Stowell,* 6 Cal. App. 2d 373 [44 P. 2d 392]; *Bell v. Bank of California,* 153 Cal. 234 [94 P. 889].) . . ." (98 A. C. A. at 513-514; italics added.)

Thus, the surplus funds arising under one contract could not be used against the debt under another. It is important to note that the court considered the duty either "to satisfy the obligation of plaintiff's assignor or to be paid or credited to him annually" transformed the deposit into a special deposit under California law. It is impossible to distinguish such instructions from those in the present case where Salsbury ordered the Bank to collect the items and deposit them in the general account maintained by Salsbury. The Bank was under a duty to comply with Salsbury's directions and at the time of the filing of the petition for an arrangement herein the relationship of the parties as principal and agent was frozen.[7] Salsbury revoked the agency but the Bank refused to comply, holding the items under its alleged banker's lien. This action by the Bank was wholly unauthorized and contrary to the instructions of its principal. According to the *Engleman* case, California law does not permit such a breach of fiduciary duty.

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[7]*Goggin v. Division of Labor Law Enforcement, State of California* (1948), 336 U. S. 118, at pp. 125-126.

Conclusion.

Why should the Honorable Supreme Court of the United States be interested in granting a writ of certiorari based on the instant petition? Obviously, as a basic contention we earnestly contend that the Court below was in error in applying the law to the specific facts involved in this litigation; innocent general creditors have been deprived of a dividend which would arise from the sum of approximately $178,000 converted by the Bank. By seizing and converting the notes and bills representing the aforesaid amount, the Bank had very little to lose except interest on the money involved and to date has benefited by its wrongful seizure of the funds concerned.

Moving a step forward, we find that the Court below has failed to follow the position of this Court that the rights of creditors are frozen as of the commencement of bankruptcy proceedings and the Ninth Circuit has permitted the Bank to attempt to change a special purpose limited principal-agency relationship, at the time of bankruptcy, into a creditor-debtor relationship thereby approving what might best be described as an implied lien not actually recognizable when construed in the light of the applicable Bankruptcy Act provisions and the statutes interpreting these provisions.

The ruling of the Court below is directly contrary to the only analogous ruling of the courts of the State of California, which ruling became final after the opinion of the Court below. We therefore have a conflict between

the Ninth Circuit and the California courts on an issue which is destined to arise time and time again in the daily business life of every Californian. Further, the Ninth Circuit has either ignored or misconstrued the opinions of this Court passing upon identical issues wherein this Honorable Court has again and again stated that no banker's lien, either by reason of the commercial law or the state statute permitting the same, will be allowed unless credit has been extended in reliance upon the commercial paper in the hands of the Bank.

We assume that by now it is judicially known that the Bank of America is the largest bank in the world and certainly a course of conduct adopted by it which prefers the Bank over all other creditors will be adopted by banks throughout the United States. For this reason we must have a final ruling from the highest court in the land which will set forth an unmistakable definition of a "banker's lien" so that unwarranted seizures of assets belonging to a depositor will not occur, whether bankruptcy intervenes or not. The basic issue reduces itself to a simple dictionary definition of words—the Receiver contends that the Bank had only "custody" of the commercial paper involved for the limited special purpose of collecting the commercial paper and ultimately depositing it to the account of the Debtor providing the Debtor did not countermand its instructions as the principal of the Bank; true legal "possession" never left the Debtor and therefore when the bankruptcy proceedings intervened the relationship between the Debtor and the

Bank became fixed and the Bank could not act contrary to the demands of the Receiver, collect the commercial paper, and then attempt to deal with the proceeds from the paper as if it were cash deposited in a bank account. The Receiver and creditors in this matter have fought the true issue involved to this Court of last resort for the reason that it is sincerely believed that the problem involved arises in almost every banking transaction which a businessman conducts in his every day business life. These commonplace transactions with banks become a part of almost every bankruptcy proceeding in which a business is involved.

Wherefore, your petitioner prays that this Court issue a writ of certiorari reviewing the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 23, 1950 as described in the within petition and that the judgment of the said Court of Appeals be reversed.

Respectfully submitted,

GENDEL & RASKOFF, and
BERNARD SHAPIRO,
By MARTIN GENDEL,
Attorneys for the Receiver.

State of California, County of Los Angeles—ss.

Martin Gendel, being first duly sworn, deposes and says that he is the attorney for the petitioner named in the foregoing Petition for Writ of Certiorari; that he has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters, that he believes them to be true.

MARTIN GENDEL.

Subscribed and sworn to before me this 14th day of September, 1950.

(Seal) M. ALLIS,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires October 24, 1952.

Opinion of the United States Court of Appeals Which Was Withdrawn Upon the Granting of a Petition for Rehearing.

In the United States Court of Appeals for the Ninth Circuit.

George T. Goggin, Receiver of the Estate of Salsbury Motors. Inc., Appellant, vs. Bank of America National Trust & Savings Association, Appellee. No. 12,206.

Feb. 23, 1950.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before Stephens and Pope, Circuit Judges, and McCormick, District Judge.

Stephens, Circuit Judge.

A referee in bankruptcy allowed a claim filed in Chapter XI bankruptcy proceedings by Bank of America National Trust and Savings Association, herein called the Bank, overruling objections interposed by the receiver of the bankruptcy estate and denied the latter affirmative relief prayed. The district court adopted the findings of fact and conclusions of law of the referee and affirmed the order *in toto*. The receiver appeals.

For some time prior to the bankruptcy proceedings, Salsbury Motors, Inc., the debtor, had borrowed funds in various sums from the Bank pursuant to a loan credit arrangement and had maintained its major deposit account with the Bank. Salsbury had regularly delivered commercial paper to the Bank for collection with the understanding that the proceeds should be credited to its general deposit account. At the inception of these proceedings Salsbury owed the bank some $600,000 on its

loan account, and the Bank held several items for collection. In the aggregate these items amounted to the sum affirmatively prayed for by the receiver. Thereafter, with knowledge of Salsbury's intent and action herein, the Bank collected all of the items above referred to and applied the proceeds as credits upon Salsbury's indebtedness to it. Indeed, the Bank so acted as to one item after the petition in bankruptcy had been filed and after Salsbury by written notice had attempted to terminate the Bank's authority to collect such item. The claim of the Bank is for the amount allegedly due it in these circumstances while the claim of the receiver is that the money collected by the Bank upon such commercial paper after bankruptcy should be paid to him for the benefit of the estate. The referee's and the court's approval of the Bank's action was under authority of Section 3054 of the California Civil Code, which provides that:

"A banker has a general lien, dependent on possession, upon all property belonging to a customer, for the balance due to him from such customer in the course of business."

The banker's lien devolved to the common law from the law merchant. Its principle today appears almost universally in statutory form, but codification has not extended its scope. Berry v. Bank of Bakersfield, 177 Cal. 206, 170 P. 415 (1918).

The receiver contends that under the law merchant and the common law a right of lien in favor of a bank does not attach to commercial paper delivered to such bank for collection unless and until the bank extends credit thereon. He concedes that the following quotations epitomize his position: "Here, then, is the true principle upon which this, as well as other bankers' liens must be

sustained, if at all. There must be a credit upon the credit of the securities, either in possession or in expectancy." [Russell v. Haddock, 8 Ill. (3 Gil.) 237, 242 (1846)]; a banker's lien ordinarily "attaches in favor of the bank upon the securities and moneys of the customer deposited in the usual course of business, for advances which are supposed to be made upon their credit." [National Bank v. Insurance Co., 104 U. S. 54, 71 (1881).]

It is true that no credit upon specific items was given upon the delivery of any of the collection items to the Bank, nor had such credit been given or asserted prior to the institution of these proceedings. Of course, if before such time the Bank had collected and credited the proceeds to Salsbury's general deposit account the sum of such proceeds would have reduced the total sum owing the Bank by the sum thereof through off-set. Such is not the case here. At the "date of cleavage," that is, when the bankruptcy proceedings were commenced and before collection of the securities in suit, the relationship between Salsbury and the Bank was one of principal and agent. The question is: Did the Bank at that date have a lien on the commercial paper belonging to Salsbury? If it did, neither the bankruptcy proceedings nor the attempt to terminate the agency could affect it.

There is no problem here as to whether the lien is impressed upon securities delivered to a bank under an instruction to collect and deposit the proceeds to the deliverer's account, without more. Whether the California statute, in these limited circumstances, would act to impress a lien upon commercial paper we need not decide.

At the referee hearing counsel for the receiver stated: "That the Debtor herein in 1946 entered into a sizable lending transaction with the Bank of America in excess of

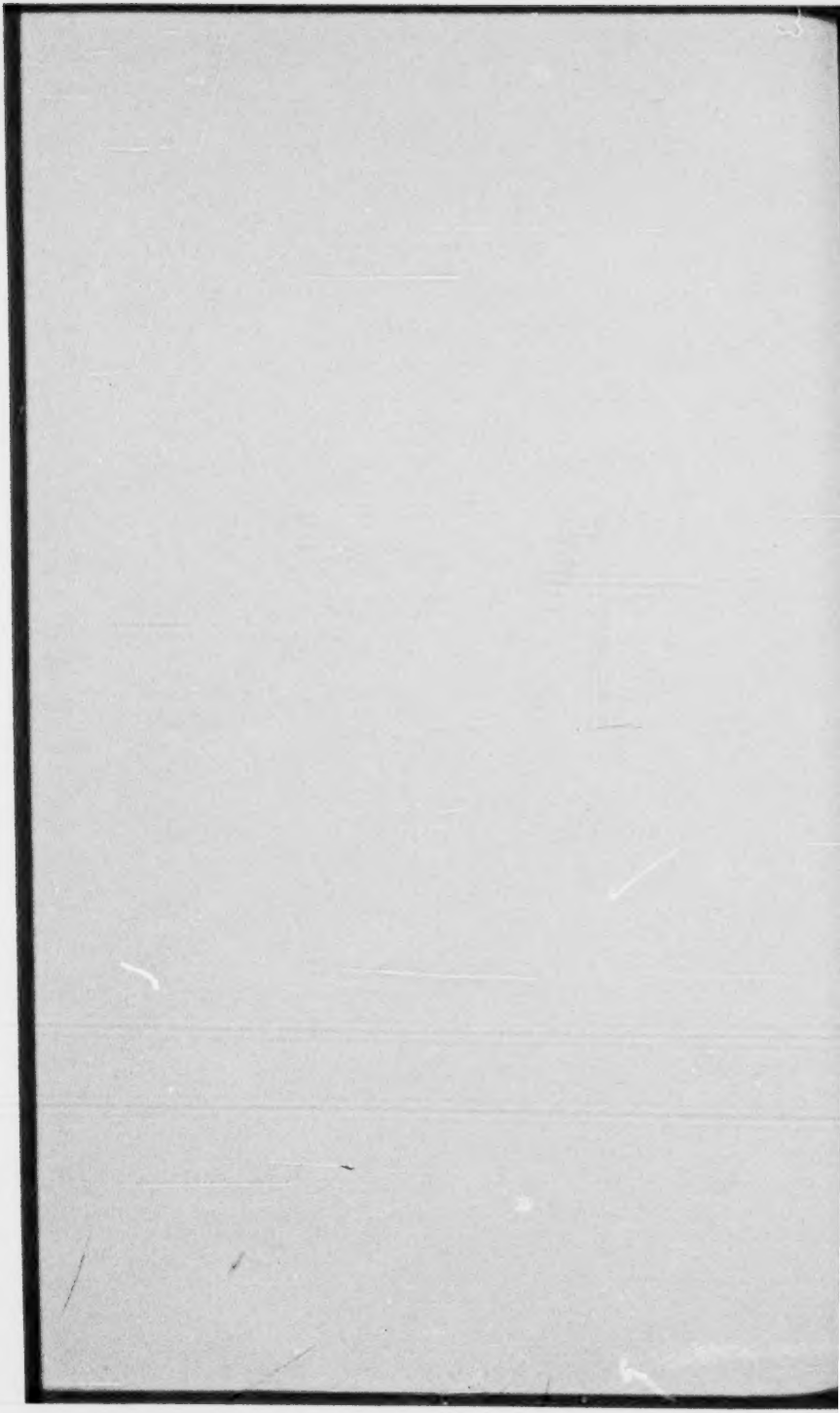
$600,000. That during the year 1946 the average on collections made by the Bank of America on behalf of the Debtor was $40,000 to $50,000. That there was apparently an implied understanding between the Bank of America and the Debtor corporation that all of the usual banking transactions would be handled through the Bank of America and the deviations from that were minor and only for reasons of convenience with the knowledge and consent of the bank and the implied understanding included that as to collections of notes or sight drafts or bills of lading that they would be handled through the collection department of the Bank of America."

The facts of the case, succinctly stated by counsel, indicate that Salsbury was doing a rather large continuing general banking business with the Bank and that when the Bank entered upon the loan arrangements with Salsbury it fully expected this relationship to continue for the mutual business benefit of both parties under their common knowledge that the securities left with the Bank by Salsbury were a part of the business, all of which constituted the basis for the credit given. To that extent the advances were made upon the credit of the very items proceeds of which are here claimed by the receiver.

The statute is fully satisfied.

Affirmed.

(Endorsed): Opinion. Filed Feb. 23, 1950. Paul P. O'Brien, Clerk.



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1 Jones on Liens (3d Ed.), pp. 250, 253 10

IN THE

Supreme Court of the United States

October Term, 1950.

No. 311

GEORGE T. GOGGIN, Receiver of the Estate of Salsbury Motors, Inc., Debtor,

Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the Referee appears at R. 78 and his findings and order appear at R. 80-92. The District Court's findings and order appear at R. 109-110. The opinion of the Court of Appeals [R. 123-133] is reported in 183 F. 2d 322.

Jurisdiction.

The judgment of the Court of Appeals sought to be reviewed was entered June 23, 1950 [R. 134]. The petition for a writ of certiorari was filed on September 16, 1950. The jurisdiction of this Court is invoked under Title 28, U. S. C., Sec. 1254, as amended by the Act of June 25, 1948 (Public Law 773, 80th Cong., 2d Sess., C. 646, 62 Stat. 869) and under Section 24c of the Bankruptcy Act, 11 U. S. C., Sec. 47c.

Question Presented.

May a bank assert a banker's lien pursuant to California Civil Code, Section 3054, upon notes and drafts belonging to the debtor in its hands at the time of filing of a petition under Chapter XI of the Bankruptcy Act, when such notes and drafts had been deposited for collection and credit to the deposit account of the debtor in the usual course of business, and when there existed a past due indebtedness from the debtor to the bank.

Petitioner's statement of the question presented (Pet. p. 3) is inadequate in the following particulars: It fails to reveal the existence of the past due indebtedness from debtor to Respondent [R. 70, 83]. Petitioner's question states that the notes and drafts were in the custody of the bank for collection only, whereas the record shows that the bank held the paper "in its hands" [R. 71, 83]. Petitioner's statement of the question fails to reveal that the paper had been deposited for collection and credit to the deposit account, in the usual course of business, when the proceeds of the collections were received [R. 76, 89].

Statutes Involved.

1. Section 3054 of the Civil Code of California:

> A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business.

2. Section 67b of the Bankruptcy Act (11 U. S. C. Sec. 107b) is set forth in full in the Petition at page 3.

Statement.

Since the Petitioner's statement is substantially correct, it is not considered necessary to repeat the statement here.

ARGUMENT.

The Petitioner has failed to demonstrate any error in the decision sought to be reviewed. In several places in his brief Petitioner refers to the "seizure" of the commercial paper belonging to the debtor (Pet. 12, 14, 29, 30) and implies that such "seizure" was illegal. It is to be noted, however, that it was stipulated that the commercial paper was in the hands of Respondent at the time of filing the petition [R. 70, 71], and obviously there could have been no "seizure" of property which was already in Respondent's hands. Furthermore, no light is shed upon the problem here involved by Petitioner's characterization of the valid exercise by the Respondent of the lien rights conferred upon it by statute as a "seizure" or a "conversion."

In furtherance of this line of argument the petition states (p. 30): "The basic issue reduces itself to a simple dictionary definition of words—the Receiver contends that the Bank had only 'custody' of the commercial paper involved . . ." and that "true legal 'possession' never left the Debtor . . ." A discussion of the distinction between "custody" and "possession" is beside the point. The statute involved states that the lien attaches when the banker has "in his hands" property belonging to a customer. The stipulated fact is that at the date of filing of the bankruptcy petition "claimant [Respondent] held in its hands" the commercial paper under discussion [R. 71, 83].

The basic issue in the case may be simply stated. At the date of the filing of the petition the debtor was indebted to Respondent in the aggregate amount of approximately $601,000 [R. 70, 83]. On that date Respondent Bank held in its hands the commercial paper which had been deposited in the regular course of business for collection and

credit to the deposit account of the debtor when the proceeds of the collections were received. No immediate credit had been made to the deposit accounts of the debtor upon the deposit of the commercial paper, nor was the commercial paper in any way pledged to secure the indebtedness of the debtor [R. 76, 89].

It would appear that from the simple language of the statute and the stipulated facts there would be no room for argument. The Petitioner has asserted in each of the Courts below that under the common law the banker's lien did not attach unless there was an extension of credit upon the faith of the items coming into the possession of the banker [R. 125]. This contention is made notwithstanding the fact that such a requirement is not contained in the language of the statute. Petitioner points to the statement of the California court that the statute did not extend the scope of the banker's lien known to the common law,[1] and argues, without support from the authorities, that extension of credit on the faith of the particular paper was a necessary prerequisite to the existence of a lien under common law. The opinion of the United States Court of Appeals for the Ninth Circuit shows that that Court examined this point with utmost care. It points out that none of the cases cited by Petitioner is contrary to the Court's conclusion [R. 130]. The Court of Appeals commented upon every case cited by Petitioner to indicate the true point decided, and to show that the decisions did not support the proposition urged by Petitioner [R. 130, f.n. 4]. Notwithstanding this extensive research and analysis

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[1]*Berry v. Bank of Bakersfield*, 177 Cal. 206, 209, 170 Pac. 415 (1918).

by the Court of Appeals, Petitioner does no more than assert that even a cursory study of the cases would indicate that the conclusion of the Court of Appeals with respect to them is erroneous (Pet. 23). The petition does not attempt to show specific error in any of the conclusions of the Court of Appeals in this respect.

It is believed that the points made as specific reasons for granting the writ are not sound, and these will now be discussed.

1. The Question of Whether the California Statute Was Properly Applied to the Facts of This Case Is Not a Question of Law of Sufficient Importance to Warrant the Issuance of a Writ of Certiorari.

The first point urged by Petitioner as a reason for granting the writ is that the extent and operation of the banker's lien is of vital importance in the administration of the Bankruptcy Act throughout the United States. The California statute here involved, however, is no different from any other state statute regulating liens and other property rights. While it is true that such laws are frequently involved in the administration of the Bankruptcy Act, in the sense that the rights of the parties in bankruptcy proceedings are governed by them, this fact in itself is not a basis for a hearing in this Court.

There is no issue with respect to any provision of the Bankruptcy Act or any other federal statute. The record shows no claim of a preference under Section 60a of the Bankruptcy Act, and the petition does not take issue with the conclusion of the Court of Appeals that the banker's lien is a statutory lien and therefore excepted from the operation of Section 60a by the provisions of Section 67b of the Bankruptcy Act [R. 133].

The Petitioner contends that the Court of Appeals erroneously applied the law of California to the facts of the case (Pet. p. 29). Three Courts, the Referee, District Court, and the Court of Appeals have correctly reached the contrary conclusion. In the absence of some showing of conflict between the decision of the Courts below and the decisions of other Courts, it is clear that there is no important question of law involved requiring the issuance of a writ of certiorari in this case. *Ex parte Woods,* 143 U. S. 202, 36 L. Ed. 125, 12 S. Ct. 417 (1891); see *Forsyth v. Hammond,* 166 U. S. 506, 514-515, 41 L. Ed. 1095, 17 S. Ct. 665 (1896).

2. The Decision of the Court of Appeals Is Not in Conflict With Any Decision of the Supreme Court of the United States.

The second reason urged by Petitioner for the granting of the writ is that the opinion of the Court of Appeals is contrary to the language and rulings of this Court.

The argument apparently is that the decision of the Court of Appeals conflicts with the decision of this Court in the two cases of *Bank of Metropolis v. New England Bank,* 42 U. S. (1 How.) 234 (1843), and *Bank of Metropolis v. New England Bank,* 47 U. S. (6 How.) 212 (1848). In particular the Petitioner takes issue with the statement in the opinion of the Court of Appeals that these cases involve the situation in which the property upon which the lien was asserted belonged to a third person and not the person who placed it in the hands of the bank

[R. 131, f.n. 4(3)]. The Petitioner asserts (Pet. p. 18) that the distinction is not apparent in the opinions of this Court.

This assertion is unfounded. The very portions of the opinion of this Court quoted at pages 17 and 18 of the petition state the rule to be that the Bank of Metropolis, asserting a banker's lien against a forwarding bank, could not do so *as against the real owner* unless credit was given to the bank placing the commercial paper in the hands of the Bank of Metropolis.

The conclusion of the Court of Appeals with respect to the cases referred to was clearly correct. The limitation applied by this Court in the *Metropolis* cases was restricted to the situation in which the commercial paper upon which a lien was claimed belonged to a third party and not to the bank's customer. The rule of the *Metropolis* case may be stated thus: A bank has no lien upon paper deposited into its hands for collection which is *not* the property of the depositing customer, *unless* it has extended credit on the faith of the deposit. This is far from a holding that an extension of credit on the faith of the deposit is a prerequisite to the existence of a lien where the paper deposited *was,* as here, the property of the depositing customer.

In the first of the *Metropolis* cases this Court in its discussion of the issues considered what the situation might have been if the commercial paper, which had been forwarded for collection and credit when the proceeds were received, had belonged to the Commonwealth Bank, which

forwarded the paper to the Bank of Metropolis for collection and which was indebted to the Bank of Metropolis. In that situation this Court concluded that there would be no doubt of the right of the Bank of Metropolis to retain the paper under its banker's lien, saying (42 U. S. 234, at 239):

> * * * it has long been settled, that wherever a banker has advanced money to another, he has a lien on all the paper securities which are in his hands for the amount of his general balance, unless such securities were delivered to him under a particular agreement.

This is the exact situation in the present case. The paper belonged to the Bank's customer. It came into the Bank's hands for collection and credit to the account of the customer. There was a general balance due from the customer to the Bank. The right to the banker's lien attached.

The Petitioner refers to *Central National Bank v. Connecticut Mutual Life Insurance Company* (sometimes cited *National Bank v. Insurance Co.*[2]), 104 U. S. 54, 71 (1881). That case did not involve a banker's lien but the right of the bank to exercise an offset against a deposit account. The Court's reference to the banker's lien was by way of explanation of the asserted right of offset. In any case, no quarrel can be had with the proposition that if a bank has knowledge that the property coming into its hands does not belong to its customer it cannot assert a banker's lien upon it.

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[2]Cited in the petition as *Hanover Bank v. Insurance Co.*

It is respectfully submitted that the decision of the Court of Appeals does not conflict with decisions of this Court, nor is there any conflict in the language of the opinions.

3. The Decision of the Court of Appeals Does Not Extend the Scope of the Banker's Lien.

In support of the contention that the opinion of the Court of Appeals extends the scope of the banker's lien as known to the common law and provided by the California statute, the Petitioner repeats his assertion that the banker's lien does not attach unless credit is extended upon the property coming into the hands of the bank.

Petitioner refers to the case of *Davis v. Bowsher*, 5 T. R. 488, 101 Eng. Rep. 275 (1794), which is referred to and relied upon in the opinion of the Court of Appeals [R. 127]. The case does not support Petitioner's contention. On the contrary it is direct authority supporting the conclusion of the Court of Appeals. The facts of that case were that in a course of dealing bills had been lodged with the banker for collection. Some bills had been discounted and there was a general balance due to the banker when the bill in suit was lodged with the banker for collection. No credit was advanced upon the bill, and when the advance subsequently requested was refused the payee demanded a return of all of the items which had not been discounted.

These were the facts which gave rise to the decision of the eminent Lord Kenyon, Chief Justice, quoted in the opinion of the Court of Appeals, to the effect that wherever a banker has advanced credit to a customer, he has a lien on all of the paper securities which come into his hands while the balance is outstanding unless he received any

particular security under special circumstances which would take it out of the general rule.

The banker's lien has been repeatedly upheld in situations in which, at the time there is a balance owing to the bank, commercial paper has been deposited with the bank for collection and no credit has been advanced upon such deposit. The tacit holding of these cases is that paper deposited with a banker for collection without a coincident extension of credit on the faith thereof is paper "in the banker's hands in the course of the business." Some of the cases decided upon such facts are cited in the margin.[3]

As we have previously pointed out, the Petitioner has cited no case in support of his assertion that the banker's lien does not attach unless credit is extended upon the item deposited with the banker except *Bank of Metropolis v. New England Bank, supra.* Historically the decisions show that the banker's lien may be asserted only upon property belonging to the customer. That limitation is in the California statute. The decision of this Court in the *Metropolis* case is therefore not applicable to the facts of this case nor in conflict with the decision of the Court of Appeals.

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[3]*Gibbons v. Hecox,* 105 Mich. 509, 63 N. W. 519 (1895); *Greene v. Jackson Bank,* 18 R. I. 779, 30 Atl. 963 (1895); *Cockrill v. Joyce,* 62 Ark. 216, 35 S. W. 221 (1896); *Joyce v. Auten,* 179 U. S. 591, 45 L. Ed. 332 (1900); *Goodwin v. Barre Savings Bank and Trust Co.,* 91 Vt. 228, 100 Atl. 34 (1917); *Farr-Barnes Lumber Co. v. Town of St. George,* 128 S. C. 67, 122 S. E. 24 (1924); *Citizens Bank and Trust Co. v. Yantis,* 287 S. W. 505 (Tex. Civ. App. 1926); *Wells Fargo Bank & Union Trust Co. v. McDuffie,* 71 F. 2d 720 (C. C. A. 9, 1934). See notes to *Garrison v. Union Trust Co.,* 139 Mich. 392, 102 N. W. 978, 111 Am. St. Rep. 407 (1905), and 1 Jones on Liens, 3d ed., pp. 250, 253.

The opinion of the Court of Appeals carefully and correctly distinguishes all of the cases cited by Petitioner [R. 130-132, f.n. 4, 5]. In the absence of some attempt by Petitioner to show error in the Court of Appeals' classification of those cases, it is not considered necessary to review them here. A reference to the cases will show that the Court's classification of them is correct.

4. The Decision of the Court of Appeals Is Not in Conflict With California Law.

The final reason urged by Petitioner for granting certiorari is that the opinion of the Court of Appeals is in direct conflict with governing California law with respect to the extent of the banker's lien.

The Supreme Court of California in the case of *Gonsalves v. Bank of America*, 16 Cal. 2d 169, 173, 105 P. 2d 118 (1940), stated that:

> The banker's lien described in this statute is, properly speaking, a lien on the securities such as commercial paper deposited with the bank by the customer in the course of business.

That case involved a discussion of the right of setoff, and technically, therefore, it may be considered that the language was not necessary to the decision. Notwithstanding that, it is the considered expression of the Supreme Court of California interpreting a statute of the State of California which is directly involved in the present litigation. In the absence of a showing of some contrary ruling in a case in which the issue was directly involved, it is

entitled to be considered as the law of that state. The decision of the Court of Appeals is not in any sense in conflict with the decision or opinion in the *Gonsalves* case, ***supra.***

The only other respect in which it is contended that the decision of the Court of Appeals conflicts with California decisions is in connection with the case of *Engleman v. Bank of America,* 98 A. C. A. 509, which, as the Petitioner points out (p. 26), was decided on July 7, 1950, after the decision of the Court of Appeals was filed on June 23, 1950 [R. 133, 134].

The decision of the Court of Appeals is not in conflict with the holding of the California District Court of Appeal in *Engleman v. Bank of America, supra.* In that case the Court determined that under the facts the monies held by the defendant bank did not constitute a general deposit but rather constituted a special deposit or a deposit for a special purpose and that therefore the right of offset could not be applied. It held further that if the monies were considered to be held as a pledge, they had been pledged for a specific obligation and in keeping with the general principle expressed in the cases, including *Berry v. Bank of Bakersfield,* 177 Cal. 206, 209, 170 Pac. 415, they could not be held under a banker's lien to secure some other obligation. The commercial paper deposited for collection and credit to the general account of the debtor corporation here was not pledged as security for any obligation, and as the paper had not been collected at the time of filing the bankruptcy proceedings, there is no question of offset involved.

Conclusion.

It is respectfully submitted that the petition for certiorari should be denied because:

1. There is no showing of special or important reasons therefor in keeping with the provisions of Rule 38, Subdivision 5, of the Rules of this Court; and

2. There is no showing of error in the decision of the Court of Appeals, or of any conflict between that decision and applicable decisions of this Court, the Courts of Appeal of other Circuits, or the California Courts.

Respectfully submitted,

HUGO A. STEINMEYER,
ROBERT H. FABIAN,
Attorneys for the Respondent.

Of Counsel:
SAMUEL B. STEWART, JR.

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IN THE

Supreme Court of the United States

October Term, 1950.

No. 311

GEORGE T. GOGGIN, Receiver of the Estate of SALSBURY MOTORS, INC.,

Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,

Respondent.

Petition for Rehearing of Denial of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Rehearing of Denial of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, George T. Goggin, as receiver of the estate of Salsbury Motors, Inc., hereby petitions for a rehearing of this Court's denial on November 6, 1950, of the Petition for Writ of Certiorari heretofore filed by the said receiver.

Grounds of Petition for Rehearing.

In his original petition before this Honorable Court, your petitioner urged several grounds whereby, on the merits, the writ should issue. The last ground stated therein was the recent California case of *Engleman v. Bank of America* (July 7, 1950), 98 A. C. A. 509, which supports petitioner's position and is in direct conflict with the decision of the United States Court of Appeals for the Ninth Circuit.

Your petitioner now respectfully urges that if this Honorable Court denies the issuance of the writ, it should remand the cause to the United States Court of Appeals for the Ninth Circuit so that said Court may have an opportunity to examine its judgment and opinion in the light of *Engleman v. Bank of America* which was decided subsequent to the rendering of the Court of Appeals' opinion herein. Indeed, in that opinion the Court stated:

> "However, no California case has been found which interprets such statute in the circumstances obtaining here." [Tr. 127.]

The *Engleman* case is one where the Bank of America sought to assert its banker's lien to a certain fund and the California District Court of Appeal flatly held that where the Bank collects money for a customer under instructions that said funds are to be used to satisfy the obligation of the customer "or to be paid or credited to him annually," the Bank "was not entitled to hold it, under its alleged banker's lien, to secure another obligation." (98 A. C. A. at 513.)

The *Engleman* case is so similar to the instant case that it would be unfair to permit a final determination of this

cause unless this Honorable Court or the Court of Appeals has had an opportunity to study the latest and most pertinent views of the controlling state court on the question. Although the extent of the banker's lien has been declared by the California courts to be a codification of the rule of common law, it is clear that the decisions of the California courts are of controlling significance when the issue arises in the State of California.

Your petitioner urgently stresses the wisdom and appropriateness of this proposed alternative disposition; that is, the remanding of this cause to the United States Court of Appeals for the Ninth Circuit so that said Court may review its ruling in the light of the *Engleman* case. It is apparent from the Court of Appeals' opinions herein that said Court was deeply concerned over the issues raised by the within appeal and gave extended consideration to these problems, both in the execution of its original opinion and in its opinion on rehearing. At that time it appeared that there was no California case strongly touching upon these issues. Your petitioner sincerely believes and represents that the judges of the United States Court of Appeals for the Ninth Circuit are concerned with controlling state law toward the end that their opinion in this case shall be reconciled with the latest and governing declarations of the state appellate courts on the legal issues before them. No useful purpose could be served, and indeed serious harm would be caused by, the lack of reconciliation between the outstanding opinion herein and the holding and language of the California District Court of Appeal in the *Engleman* case. At the risk of repetition we respectfully point out that the opinion of the United States Court of Appeals was filed on June 23, 1950, and the opinion of the California District Court of Appeal was

filed on July 7, 1950, and not reported until some time thereafter and not called to the attention of the United States Court of Appeals at any time owing to the lack of knowledge by your petitioner of its pendency.

Wherefore, your petitioner prays that this Honorable Court reconsider its Order of November 6, 1950, denying a writ of certiorari herein and issue a writ of certiorari reviewing the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 23, 1950, or, in the alternative, remand the within cause to said Court of Appeals for a reconsideration of the case in the light of *Engleman v. Bank of America* (July 7, 1950), 98 A. C. A. 509.

Respectfully submitted,

GENDEL & RASKOFF, and
BERNARD SHAPIRO,
By MARTIN GENDEL,
Attorneys for the Receiver.

State of California, County of Los Angeles—ss.

Martin Gendel being first duly sworn, deposes and says: That he is the attorney for the petitioner named in the foregoing Petition for Rehearing of Denial of Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit; that he has read the foregoing and knows the contents thereof; that the same is true of his own knowledge except as to matters which are therein stated upon his information or belief, and as to those matters that he believes them to be true; and that the foregoing Petition For Rehearing of Denial of Petition for Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit is presented in good faith and not for delay and that said petition is restricted to a ground not previously presented.

MARTIN GENDEL.

Subscribed and sworn to before me this 17th day of November, 1950.

M. ALLIS,

Notary Public in and for said County and State of California.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 311.

GEORGE T. GOGGIN, Receiver of the Estate of SALSBURY MOTORS, INC.,

Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,

Respondent.

REPLY TO PETITION FOR REHEARING.

The sole point urged in the petition for rehearing is that a subsequent decision of the California District Court of Appeal[1] is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit and that therefore this Court should grant certiorari or remand the case to the Court of Appeals for further consideration.

In the petition for certiorari (pp. 25-28) it was argued at length that the decision of the Court of Appeals was in conflict with California law because contrary to this same decision of the California District Court of Appeal.

[1]*Engleman v. Bank of America* (July 7, 1950), 98 A. C. A. 509.

It is respectfully submitted that the case of *Engleman v. Bank of America,* cited in the petition for certiorari and again in the petition for rehearing, is not, on its facts, comparable to the facts in the present case. Further, the legal principles stated by the California Court with respect to the application of a banker's lien are entirely in conformity with the principles set forth in the opinion of the Court of Appeals. (See Brief in Opposition, p. 12.)

It is respectfully submitted that the petition for rehearing should be denied.

Respectfully submitted,

HUGO A. STEINMEYER,

ROBERT H. FABIAN,

Attorneys for Respondent.

SAMUEL B. STEWART, JR.,

Of Counsel.